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No. 79-1268

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1268

PATRICIA HARRIS, Secretary, United States Department of Health, Education and Welfare,

Appellant,

-and-

SENATOR JAMES L. BUCKLEY, et al.,

Intervenor-Appellants

v.

CORA MC RAE, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of New York

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE and BRIEF OF AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The Bergen-Passaic Health Systems Agency, Hudson Health Systems Agency, and Southern New Jersey Health Systems Agency (HSAs) and the Essex County Executive, Peter Shapiro, hereby respectfully move to file the attached brief amici curiae in this case.

The consent of the appellant's attorneys was requested and granted. Consent of the appellees' attorneys was requested and granted. Consent of the attorney for intervenor-appellant, Pernicone, was requested and granted. Consent of the attorney for intervenor-appellants Buckley, Hyde, and Helms, was requested but refused.

Bergen-Passaic Health System Agency, Hudson Health Systems Agency, Southern New Jersey Health Systems Agency, are established pursuant to the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300 k. et. seq.

Their interest in the present litigation arises from the fact that they, as statutorily established bodies, having as their primary responsibility, the planning of all necessary health related services for their residents.

One question the Court will address is the constitutionality of the removal of a large class of "medically necessary" abortions from Medicaid coverage. The impact of this removal upon the health planning needs of these areas, and upon the health of its citizens requiring abortions, particularly with regard to the accessibility of adequate facilities, is a subject which is particularly suited to the interests of amici HSAs. Abortion services are an integral part of compre-

hensive family planning and maternal and child care. See Alan Guttmacher Institute, Abortion: Need Services and Policies: New Jersey (1980) p. 33.

Essex County Executive is the executive of the County. He is charged with the duty of ensuring that all terms imposed in favor of the County or its inhabitants in any statute are faithfully kept and performed. The County Executive seeks to discharge that duty by appearing amicus curiae in the Court's consideration of the constitutionality of Hyde Amendment which prevents Essex County's indigent residents from securing all medically necessary services.

The brief which the amici curiae are requesting permission to file will contain a more complete argument addressed to accessibility and its consequences which the HSAs and the Essex County Executive are in a position to specifically address. This practical aspect of the issue is a critical one for those charged with obtaining equal access to quality health care.

Respectfully submitted,

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March 13, 1980

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BRIEF OF AMICI CURIAE

STATEMENT OF INTEREST

Health Systems Agencys (HSAs) are private non-profit corporations enacted pursuant to 42 U.S.C. § 300k. et. seq., National Health Planning & Resources Development Act of 1974. They are part of a statewide system of health planning established by federal law. There are five HSAs in the State of New Jersey, three of them are joining in the filing of this amicus brief: Bergen-Passaic Health Systems Agency, Hudson Health Systems Agency, and Southern New Jersey Health Systems Agency.

For the purpose of:--

(1) improving the health of the residents of a health service area,

(2) increasing accessibility, acceptability and continuity and quality of the services,

(3) restraining costs, and

(4) preventing duplication,

each H.S.A. has as its primary responsibility the provision of effective health planning for its area and the promotion of the development within the area, manpower, and facilities which meet identifiable needs and reduce inefficiencies.

42 U.S.C. § 300 1-2.

To this end, the H.S.A.s make yearly plans to assess the health needs of the area and to determine how they are met.

All this data is further developed in a statewide plan.

These health planning bodies are interested in ensuring that all medically necessary services are provided to satisfy the needs of their areas. Abortion services are an integral part of this planning and health care.

The agencies are concerned that the majority of medically necessary abortions may be arbitrarily removed as a Medicaid service, thereby leaving their areas without the means and facilities to provide for indigent women whose health needs require abortions. The result of such a removal of services would be a denial of access, and increased expenses to the women who are defined as categorically needy. Unable to meet these expenses, and absent the existence of charities, the resulting situation would appear to be: increased serious health risks for the woman if no abortion were obtained or if an abortion is deferred until it is life-threatening, or alternatively, increased health risks resulting from obtaining illegal or self-induced abortions.

All these results are contrary to the over-all priority goal of the H.S.A.s and the act which attempts to achieve equal access to quality health care. See 42 U.S.C. § 300k.

Finally, if medically necessary abortions are not covered by the existing Medicaid structure, this will create the need for duplication of these services for the poor women without adequate funds,

which will, in turn, increase medical costs generally.

> To improve accessibility of abortion services to poor women, it is necessary that public (Medicaid) funding for abortion services be available throughout the State.

Alan Guttmacher Institute, Abortion: Need Services, and Policies: New Jersey (1980) p. 34.

Essex County Executive is charged with the duty of enforcing all laws applicable to the County and of ensuring that all terms imposed in favor of the county or its inhabitants in any statute are faithfully kept and performed. N.J.S.A. 40:41A-36 (c)(j). In the instant case, the County Executive seeks to fulfill those duties by appearing amicus curiae in the Court's consideration of the constitutionality of the Hyde Amendment which prevents Essex County's indigent residents from securing all medically necessary services.

The impact of Hyde Amendment is particularly acute in Essex County where over 15% of population is dependent on Medicaid to secure medically necessary services. The health problems in Essex County are demonstrated by the fact that its maternal mortality rate is twice the "acceptable" national rate and three times the maternal mortality rate for the State of New Jersey. New Jersey Department of Health, 1977, N.J. Health Statistics, J. Smolenski, Principles of

Community Health (1977). From 1975 to 1977 when State legislation, which was recently invalidated in Right to Choose v. Byrne, 165 N.J. Super 443 (Ch. 1979), proscribed funding for all but life endangering abortions, the maternal mortality rate nearly doubled. N.J. Health Statistics, supra.

In light of the negative impact which lack of funding for medically necessary abortions will have on the existing health problems in Essex County and in light of the disproportionate effect, such exclusion would have on the poor residents of the County who have such great health needs and such dependence on government to meet those needs, the Essex County Executive joins as amicus curiae in urging this Court to declare that Medicaid recipients are entitled to the same coverage for those abortions which are medically necessary as is provided by Medicaid for all other medically necessary services.

LEGAL ARGUMENT

THE GOVERNMENT CANNOT ESTABLISH A COMPREHENSIVE PROGRAM OF MEDICAL ASSISTANCE FOR THE NEEDY COVERING ALL MEDICALLY NECESSARY SERVICES EXCEPT FOR MEDICALLY NECESSARY ABORTIONS

A. RATIONALITY

One issue raised in this case is whether the government can establish a comprehensive program of medical assistance for the needy, covering all medically necessary services except for medically necessary abortions.

The Hyde Amendment is the exception to a federal-state scheme known as Medicaid, which has as its purpose the coverage of medical assistance to those unable to meet the costs of necessary medical services. 42 USC §§1396 et. seq.

The Hyde Amendment reads as follows:

> ...(N)one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term, or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly...; or except in those instances where severe and long-lasting physical health damage to the mother would result if pregnancy were carried to term when so determined by two physicians.

P.L. 95-480 §210, 92 Stat. 1586.

It has been recently amended to exclude the case of abortions necessary to prevent severe and long-lasting physical health damage to the mother. P.L. 96-123 §109.

The Constitution imposes no obligation on the State to pay for pregnancy-related medical expenses of indigent women. Indeed, there is no requirement to pay for any medical expenses. But, when a State decides to provide medical care to alleviate some of the hardships of poverty, the manner with which it dispenses its benefits is subject to constitutional limitations. Maher v. Roe, 432 U.S. 464, 469-70 (1977).

Maher upheld the validity of a statute prohibiting Medicaid funding for elective, i.e., non-therapeutic abortions. In analyzing whether there was any rational basis for this exclusion, the court held that the State's interest in encouraging normal childbirth was a legitimate State interest that was rationally furthered by this legislation. The statute in that case was held not to be violative of the Equal Protection Clause of the Fourteenth Amendment.

While a State can rationally prefer childbirth over the woman's right to control her own body according to Maher, the question here is whether the government can rationally prefer childbirth over a risk to the woman's health.

Crucial to an understanding of the Maher decision is the fact that the Medicaid

recipients sought abortions that their doctors did not deem to be "medically necessary." There was no question that the women seeking abortions in Maher could sustain a normal pregnancy and childbirth. Thus the abortions sought were "unnecessary medical services." Time and time again the Court referred to the State's interest in "encouraging normal childbirth." 432 U.S. at 477, 478, 479. Absent was the need to consider the woman's health.

The most persistent theme in this Court's abortion decisions is the primacy of the woman's health. Roe v. Wade 410 U.S. 113 (1973). This Court recognized the interest in fetal life as constitutionally permissible, but concluded that even at the point of viability the State may not go so far as to proscribe abortion "when (abortion) is necessary to preserve the life or health of the mother." 410 U.S. at 163-4.

The Court strongly implied that the State's interest in preserving the pregnant woman's health--presumably derived from her own interest in preserving her health--was necessarily stronger than the State's interest in protecting the fetus. Certainly, the lesson of Roe is that whatever steps a state takes to promote its interest in protecting fetal life cannot be taken at the expense of the mother. Accord, Colautti v. Franklin 439 U.S. 379 (1979) invalidating an abortion technique which might require a doctor to accept greater risks to maternal health in order to increase the chances of fetal survival.

Nothing this Court has held is to the contrary. Maher is consistent with this

uncompromised theme, because of the absence of health considerations or risk to the mother. Accord, Doe v. Percy, 476 F. Supp. 324 (W.D. Wisc. 1979).

B. PENALTY

The Hyde Amendment sets up two classes of indigent women--those who medically need an abortion and those who need any other medically necessary procedure. Those in the abortion group, although able to demonstrate a medical necessity, cannot obtain the needed medical help unless their situation falls into the narrow confines of the Hyde categories.

Whenever a statute treats different classes of individuals differently, that legislative line-drawing is properly the subject of judicial scrutiny. The statute, in order to pass constitutional muster, must rationally further some legitimate, articulated State purpose. San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973), Maher v. Roe, supra, at p. 497.

The articulated State interest in this case is that upheld in Maher v. Roe, the protection of the fetus through normal childbirth. In sharp contrast to Maher, however, is the fact that we are concerned here with a medical necessity warranting an abortion. Necessarily, the government's interest in childbirth must be diminished by the acknowledged interest in the life of the mother. Williams v. Zbaraz, U.S., 60 L.Ed 2d 1033, 1037 (May 24, 1979), stay denied, Opinion of Stevens, J.

While Maher can be justified on the grounds that the legislature chose a neu-

tral funding criteria--that of medical necessity--as the basis of distributing welfare benefits, no such neutral standard has been used here. Instead, Congress has chosen to provide medical assistance for all purposes except medically necessary abortions. Surely, this act constitutes a penalty. If this case does not present a penalty situation then Congress has the right, for example, to provide campaign financing to all candidates except those who wish to use funds to espouse socialistic ideas, or democratic, as opposed to republican ideas, or any ideas in disfavor with the legislature. The point is, the government may not set up comprehensive funding programs and arbitrarily deny those benefits only to those people who come within the purposes of the program and who seek to constitutionally protect their rights just because of their politically unpopular decision.

For the denial of Medicaid benefits to constitute a penalty, the government must do more than withdraw the cost of exercising the disfavored alternative. Positive detriment must not accrue as a result of embracing the disfavored choice. Maher v. Roe, 432 U.S. at 474, 475-77.

If abortion funding is denied unless the woman's life is imminently threatened, there is a real possibility of serious, long-term health damage occuring because the government discourages the disfavored choice. Certainly this constitutes a penalty upon those seeking to obtain a medically necessary abortion. See Note, Abortion, Medicaid and the Constitution, 54 N.Y.U. L. Rev. 120 (1979).

Further, the failure to obtain an abortion may result in the denial of other medical treatment which would be covered by Medicaid, but which requires the abortion as a condition precedent for that treatment.

The encouragement of "normal childbirth" at the expense of damage to the mother's health, and the consequent increase of maternal mortality is not a legitimate State interest. Zbaraz v. Quern, 469 F. Supp. 1212 at 1219-20 (N.D. Ill. 1979). McRae v. Secretary H.E.W., 76 C 1804 (U.S.D. Ct. Ed. N.Y. 1980). Women's Health Services, Inc. v. Maher, Civ. No. H-79-40 (D. Conn. January 7, 1980) p. 23. Reproductive Health Services v. Freeman, Docket No. 79-1346 (Ct. 8, 1980) pp. 25-9.

C. EFFECTS

In choosing to fund abortions in only a few, very narrowly defined instances, the Congress has chosen to exclude the majority of health problems, where a physician, using his best medical judgment, would determine an abortion is necessary.

Uniformly, the Courts have found that the Hyde standards exclude the greater part of cases in which doctors would recommend abortion as a medically necessary procedure to safeguard the woman's health. McRae v. Secretary of H.E.W., supra, pp. 110-1, 308. Zbaraz v. Quern, supra, pp. 1219-20. Right to Choose v. Byrne, 169 N.J. Super 443, 547 (Ch. 1979). Planned Parenthood v. Rhodes 477 F. Supp. 529, 553 (E.D. Ohio 1979).

For example, in Women's Health Services, Inc. v. Maher, the Court at p. 12-13 notes:

> Among the conditions that may make an abortion medically necessary are all auto-immune diseases (rheumatic arthritis, multiple sclerosis, lupus, etc.); chronic heart, liver, and kidney diseases; chronic anemia; diabetes; phlebitis, toxemia (high blood pressure coupled with fluid retention, progressing to convulsions and sometimes death, particularly among young persons); hypertension; severe stress; schizophrenia; biological depression; and dependence on psychoactive and other medication. The Department of Health, Education and Welfare has compiled a thorough, though not exhaustive, list of 21 conditions that may indicate, under certain circumstances, the medical necessity for an abortion. In some cases, a mother's knowledge of likely fetal deformity, retardation, mortality, or morbidity generates such anxiety that an abortion becomes a medical necessity to preserve the mother's psychological health. Pregnancies in women suffering from any of these conditions cannot be termed "normal" pregnancies, nor can childbirth in such women be termed "normal" either.

And see McRae v. Secretary of H.E.W. at p. 99-113 for a thorough discussion of same.

A greater proportion of poor women have,

or develop during pregnancy, certain medical problems than those affecting the female population generally. The proportion of these women medically requiring an abortion is two to three times greater than the general population, and their maternal mortality rate is higher. Thus Hyde denies Medicaid to precisely those women who, as a medical matter, need it most. McRae v. Secretary of H.E.W., supra, pp. 101-3, 123, 309. Women's Health Services, Inc. v. Maher, supra, pp. 13-15.

Clearly, the effect of Hyde has been to severely restrict access to abortions.

In 1977, prior to the restrictions of Medicaid statutes, 67% of Medicaid women in need of abortions obtained them. Following the N.J. version of Hyde, limiting abortions to save the life of the mother, only 98 abortions were obtained in a ten and a half month period. Alan Guttmacher Institute, Abortion: Need Services v. Policies: N.J. (1980).

In McRae v. Secretary of H.E.W. at p. 293 Judge Dooling found the effect of Hyde was to reduce medically funded abortions by 95% nationally.

Finally, between the lifting of an injunction (of N.J. Statute permitting abortions only to preserve the life of the mother), and the revised order of the State Department of Health promulgated pursuant to a hearing of the Court (see below), births to Medicaid recipients went up 30% and Medicaid abortions dropped from 900 to 25 per month. The incontrovertible effect of the statute has been to block Medicaid

women from necessary abortions. Right to Choose v. Byrne, 165 N.J. Super 443, 457 (Ch. 1979).

In Maher, Mr. Justice Powell stated in discussing the cut-off of funds for elective abortions:

> Regulation places no obstacles--absolute or otherwise--in the pregnant woman's path to abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.

432 U.S. 474.

Contrary to this assumption, the withdrawal of public health service in this field does not genuinely leave the indigent woman any safe medical alternative.

> There is no evidence...and it can not be found and it is not found as a fact that Medicaid-eligible women have been able to obtain legally induced abortions through any use of their necessarily "exiguous personal funds," or at free public hospitals, or through philanthropic assistance, or reduced clinical charges.

McRae v. Secretary of H.E.W., supra, pp. 74-5.

Philanthropic or charitable institutions

are not a resource for indigent women seeking abortions. As the Circuit Court found in Eastern Kentucky Welfare Rights Organization v. Simon, 506 F. 2d 1278 (D.C. Cir. 1974) vac. and remanded for dismissal o.g. 426 U.S. 26 (1976):

> Philanthropy accounts for only a minute percentage of the hospital's total operating costs. The institution of Medicare and Medicaid in the last decade combined with the rapid growth of medical and hospital insurance has greatly reduced the number of poor people requiring free or below cost hospital services.

(p. 1288). See also Blendon, National Health Insurance: What Will Be the Impact on Private Philanthropy, Vol. 16, No. 2 Foundation News, 1975 and Blendon, Changing Role of Private Philanthropy in Health Affairs, 292 N.E. Journal of Medicine, pp. 946-50 May 1975, and McRae v. Secretary of H.E.W., p. 77.

Finally, even if somehow money or services became available, the delay in obtaining abortions is harmful. Time is critical. Risks during the first trimester are admittedly lower than during the later months. Doe v. Wade, 410 U.S. 179, 198 (1973), Women's Health Services v. Maher, supra, at p. 14, McRae v. Secretary of H.E.W., supra, 62-72, 113-116, Right to Choose v. Byrne, 169 N.J. Super at p. 547. Further, using the Hyde standards would result in failing to abort until the medical problem emerges as a crisis later because it could not be predicted earlier.

At this later stage, the risk of mortality would be "unacceptably high, resulting in a significant number of deaths." See McRae v. Secretary of H.E.W., supra, pp. 92-99 and Zbaraz v. Quern, supra, at pp. 1919-20.

The medical witnesses who testified on the health consequences that would follow if "Hyde" was made the standard for funding abortions were in agreement that it would cause an increase of abortions performed by unqualified persons and self-induced abortion, with a resulting increase in maternal mortality and post-abortion complications. McRae v. Secretary of H.E.W., supra, at pp. 67-9. In accord is Zbaraz finding the effect of Hyde is to increase substantially maternal mortality among the indigent, at p. 1220.

The availability of adequate abortion facilities is directly related to the rate of maternal deaths due to abortions. See McRae v. Secretary H.E.W., at pp. 61-67.

To exclude women from obtaining abortions which are considered to be medically necessary is an irrational act. To prefer the fetus to the woman's health acts to jeopardize her interests for the sake of potential life. Surely this is without support in any of this Court's previous decisions and cannot be seriously accepted as a legitimate mode of protecting its interest in childbirth in light of the serious negative effect upon the mother.

CONCLUSION

The Amici HSAs are charged with the responsibility of providing effective health care for those who need it. Particularly, they seek to ensure that all medically necessary services are covered. Amicus Essex County Executive seeks to protect the right of indigent county residents to receive funding for all medically necessary procedures. In light of the factual findings of this case, and others, it is clear that many indigent women will be without abortions that are medically necessary. Without Medicaid, the facilities and money necessary to procure them will be unavailable. Indeed, at this time, facilities are concentrated in urban areas which do not provide for many of those in our state. Statistics show approximately 25% of N.J. residents obtain abortions out of the state. Alan Guttmacher Institute, supra, at pp. 2, 14. This accounts for the finding in that study that in order to improve accessibility of services to the poor, public funding must be made available.

The resulting harm from the denial of these funds include the real possibility of the substantial increase of maternal deaths and greater health risks to pregnant women. These are results we do not want to see. The harm to the health of our population is a real concern.

In light of all the health concerns to the mother, and to our communities, and the irrationality of the federal government's actions, we urge that public funding for necessary abortions be available throughout the State.

Respectfully submitted,

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